Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-1067

IN THE SUPREME COURT OF THE UNITED STATES

ANDY SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where defendant was denied effective assistance of trial counsel because defendant, who claims innocence, pleads guilty after being told by his trial counsel that defendant's immigration status will not be affected by his guilty plea, Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), can that ineffective assistance excuse defendant's not filing a post-conviction petition until after termination of defendant's probation?

PARTIES INVOLVED

Petitioner, Andy Smith, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois in a Petition for Leave to Appeal.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, First Judicial District, and respondent in the Supreme Court of Illinois in a Petition for Leave to Appeal.

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1. Where misadvice of counsel advised defendant that if he received probation his conviction would have no immigration consequences so that defendant did not file a timely post-conviction petition and only filed a post-conviction petition after his probation was terminated, defendant was not culpably negligent, and defendant should be able to file a late post-conviction petition, even after his sentence was served 8

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A. Order of the Appellate Court of Illinois, First District decided June 21, 2010..... App. 1

B. Order of the Supreme Court of Illinois denying Petition for Leave to Appeal dated November 24, 2010..... App. 8

JUDGMENT BELOW

The Order of the Appellate Court of Illinois, First Judicial District, dated June 21, 2010 is attached as Appendix A to this Petition.

The denial of Petition for Leave to Appeal dated November 24, 2010 is attached as Appendix B to this Petition.

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Andy Smith, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the trial court's dismissal of his petition for relief under the Post-Conviction Hearing Act.

JUDGMENT AND OPINION BELOW

The Order of the Appellate Court of Illinois, First District dated June 21, 2010 is set out as App. A.

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal on November 24, 2010, Case No. 110785 is set out as App. B.

JURISDICTIONAL STATEMENT

Jurisdiction in the Appellate Court of Illinois, First District was based on Illinois Supreme Court Rule 603.

Jurisdiction in the Supreme Court of Illinois was based on Illinois Supreme Court Rule 603 and 615, which provides that appeals from final orders of the Appellate Court of Illinois, First District shall be taken to the Supreme Court of Illinois.

The judgment of the trial court was affirmed on June 21, 2010.

Petition for Leave to Appeal was denied on November 24, 2010.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

On June 24, 1998, defendant pled guilty to possession of controlled substance and was sentenced to 36 months probation. Defendant's probation was successfully completed on July 19, 2001.

On September 23, 2005, defendant filed a petition for a post-conviction hearing, seeking to vacate his plea. The petition alleged that defendant was innocent and that he only pleaded guilty because his attorney told him that the conviction would not prevent defendant from obtaining a green card. On October 11, 2005, the trial court dismissed the petition.

Defendant then filed an emergency amended petition for a post-conviction hearing and motion to vacate defendant's plea contending that he was innocent and that his trial counsel was ineffective when he "misrepresented" to defendant the "effect of a guilty plea" on defendant's immigration status.

Attached to the petition was the affidavit of his counsel, averring that he did tell defendant that a conviction would not affect defendant's immigration status. Counsel for defendant stated in his affidavit in support of defendant's post-conviction petition:

"4. I represented to defendant prior to his plea of guilty that because he would receive probation, his conviction would not result in his being unable to get his green resident's card, and hence, he would not be deported, or be denied other rights related to his being an alien."

On December 20, 2005, the trial court dismissed the post-conviction petition, finding that it was "without jurisdiction to entertain" the petition because defendant's probation had already been served.

On February 6, 2006, the December 2005 petition, the instant petition, was redocketed. The State then filed a motion to dismiss arguing (1) that defendant lacked standing under the Act as he had completed his probation before filing the petition, (2) that the petition was untimely, and (3) that all claims in the petition were barred by res judicata.

Although the trial court determined that the instant petition was "errantly" redocketed after it had been dismissed by a different judge, the court treated the petition as a second successive post-conviction petition and dismissed it.

Defendant appealed from the trial court's dismissal of his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 et seq. (West 2006)). On appeal, defendant contended that the trial court erred by dismissing defendant's petition when defendant's delay in filing a post-conviction petition was because of incorrect information provided to defendant by his attorney. The State contended that defendant did not have standing under the Act because he completed his sentence before filing his successive post-conviction petition. The Illinois Appellate Court affirmed on June 21, 2010.

A Petition for Leave to Appeal was timely filed in the Illinois Supreme Court on August 27, 2010 and was denied on November 24, 2010.

RAISING THE FEDERAL QUESTION BELOW

This issue was raised in the trial court, on appeal to the Appellate Court of Illinois and the Supreme Court of Illinois.

REASON FOR GRANTING CERTIORARI

1.

Where misadvice of counsel advised defendant that if he received probation his conviction would have no immigration consequences so that defendant did not file a timely post-conviction petition and only filed a post-conviction petition after his probation was terminated, defendant was not culpably negligent, and defendant should be able to file a late post-conviction petition, even after his sentence was served.

Defendant raised issues that relate to denial of his Sixth Amendment rights under the United States Constitution. Defendant asserted that at his plea he was denied his right to effective assistance of counsel. In support of the post-conviction petition, his trial counsel in an affidavit asserted:

> "4. I represented to defendant prior to his plea of guilty that because he would receive probation, his conviction would not result in his being unable to get his green resident's card, and hence, he would not be deported, or be denied other rights related to his being an alien."

Defendant's attorney provided defendant with the wrong information when he advised defendant

that if he received probation, there would be no adverse immigration consequences. This wrong information caused defendant not to file an appeal or a post-conviction petition before his probation terminated. Counsel provided defendant with wrong information that delayed defendant's taking any action on the post-conviction statute. Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and People v. Correa, 108 Ill.2d 541, 485 N.E.2d 307.

The trial court stated its reasoning for sustaining the dismissal of the post-conviction petition as follows:

> "[t]he Act [Post-Conviction Hearing Act, 725 ILCS 5/122-1 et seq.] and its remedies are not available to defendants who have completed their sentences and merely seek to purge their criminal records. *People v. Rajagopal*, 381 Ill.App.3d 326, 885 N.E.2d 1152 (2008).
>
> In this case, petitioner was sentenced to 36 months felony probation on June 24, 1998. On July 19, 2001, petitioner's term of probation was terminated satisfactorily. The instant petition was not filed until December 6, 2005, more than four years after he could be deemed 'imprisoned in the penitentiary' under any interpretation of the Act. Thus, the State's motion to dismiss is granted on the basis that petitioner lacks standing under the Act." (Order

of the Circuit Court of Cook County entered October 8, 2008, p. 3)

The court essentially dismissed the petition because it was filed after defendant had served his sentence.

The trial court improperly dismissed defendant's post-conviction petition on the basis that it was untimely and because the court accepted the State's argument that defendant's "original and successive petitions were untimely filed and the record shows that defendant was culpably negligent for failing to file the petitions within the two year statute of limitations."

The court is wrong because the delay was not due to defendant's culpable negligence and was because counsel for defendant told defendant that the conviction would have no effect on his immigration status. Counsel for defendant stated in his affidavit:

> "4. I represented to defendant prior to his plea of guilty that because he would receive probation, his conviction would not result in his being unable to get his green resident's card, and hence, he would not be deported, or be denied other rights related to his being an alien."

Defendant's attorney provided defendant with the wrong information in that defendant was told that if he received probation, there would be no adverse immigration consequences. This wrong information caused defendant not to file an appeal or a post-conviction petition. Counsel provided defendant with wrong information. Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and People v. Correa, 108 Ill.2d 541, 485 N.E.2d 307. It delayed defendant's taking any action on the post-conviction statute.

Here, the action of defendant's counsel denied defendant effective assistance of counsel in causing the plea, Padilla v. Kentucky, supra, and because of the misadvice of counsel, defendant had no reason to attack his conviction.

Under these provisions, the due process clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, when defendant was prevented from being able to attack his conviction because of misadvice of counsel, his rights were denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION
June 21, 2010
No. 1-08-3023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	Nos. 95 CR 30758 95 CR 35678 97 CR 21656
ANDY SMITH,	)	Honorable Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant Andy Smith appeals from the trial court's dismissal of his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2006)). On appeal, defendant contends that the trial court erred by dismissing defendant's petition when defendant's delay in filing a postconviction petition was because of incorrect information provided to defendant by his attorney. The State, on the other hand, contends that defendant does not have standing under the Act because he completed his sentence before filing his successive postconviction petition. We affirm.

On June 24, 1998, defendant pleaded guilty to the possession of a controlled substance, and was sentenced to 36 months' of felony probation. Defendant's probation was successfully completed on July 19, 2001.

On September 23, 2005, defendant filed a petition for a postconviction "hearing," seeking to vacate his plea. The petition alleged that defendant was innocent and that he only pleaded guilty because his attorney told him that the conviction would not prevent defendant from obtaining a green card. On October 11, 2005, the trial court dismissed the petition.

Defendant then filed an "emergency amended" petition for a postconviction "hearing" and motion to vacate defendant's plea contending that he was

innocent and that his counsel was ineffective when he "misrepresented" to defendant the "effect of a guilty plea" on defendant's immigration status. Attached to the petition was the affidavit of his counsel, averring that he did tell defendant that a conviction would not prevent defendant from obtaining a green card. On December 20, 2005, the trial court dismissed the postconviction petition, finding that it was "without jurisdiction to entertain" the petition because defendant's probation had already been served.

On February 6, 2006, the December 2005 petition, the instant petition, was redocketed. The State then filed a motion to dismiss arguing (1) that defendant lacked standing under the Act as he had completed his probation before filing the petition, (2) that the petition was untimely, and (3) that all claims in the petition were barred by res judicata.

Although the trial court determined that the instant petition was "errantly" redocketed after it had been dismissed by a different judge, the court treated the petition as a second successive postconviction petition, and dismissed it.

The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2006); People v. Delton, 227 Ill. 2d 247, 253 (2008).

Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a postconviction petition only permits inquiry into constitutional issues that were not, and could not have been, adjudicated on direct appeal. People v. Pitsonbarger, 205 Ill. 2d 444, 455-56 (2002). The Act contemplates the filing of only one postconviction petition (People v. Tenner, 206 Ill. 2d 381, 392 (2002)), and a defendant must obtain leave of court before filing a successive postconviction petition (People v. Simmons, 388 Ill. App. 3d 599, 605 (2009)). See also 725 ILCS 5/122-1 (f) (West 2006) (only "one petition may be filed *** without leave of the court").

Defendant argues that his failure to file a postconviction petition earlier was because he relied on his attorney's advice that his conviction would not affect his immigration status, and that once he learned that he had been misled by his attorney, i.e., deportation proceedings were instituted against him, he filed a postconviction petition.

Before addressing the merits of defendant's petition, we must address the State's contention that defendant lacks standing under the Act because he had completed his sentence before filing his successive postconviction petition.

This court's decision in People v. Rajagopal, 381 Ill. App. 3d-326 (2008), is instructive. In Rajagopal,

the defendant was convicted of felony theft pursuant to a guilty plea, and was sentenced to probation. Rajagopal, 381 Ill. App. 3d at 327. Eight years after the completion of his probation and several months after he learned that his application for permanent residency might be denied, defendant filed a petition for postconviction relief contending that his trial counsel was ineffective for misadvising defendant of the immigration consequences of his plea. Rajagopal, 381 Ill. App. 3d at 327. The trial court dismissed the petition. Rajagopal, 328 Ill. App. 3d at 328.

On appeal, this court determined that the Act provides relief to "those defendants currently incarcerated in a correctional facility or who were released while their timely filed petitions were pending, *** those released on appeal bond, those on mandatory supervised release, and those sentenced to probation." Rajagopal, 381 Ill. App. 3d at 329. Although the Act is liberally construed, the Act and its remedies are "not available to defendants who have completed their sentences and merely seek to purge their criminal records." Rajagopal, 381 Ill. App. 3d at 329-30. Thus, the defendant, who had successfully completed his probation, could not "now seek to avoid deportation or any other collateral consequence of his felony conviction by invoking the Act" because the constraints on his liberty caused by his conviction had terminated, along with his sentence, eight years previously. Rajagopal, 332 Ill. App. 3d at 332;

see also People v. Carrera, 394 Ill. App. 3d 368, 373 (2009) (defendant lacked standing under the Act because he filed his postconviction petition after he completed his probation).

Similarly, here, defendant completed his probation more than four years before the filing of the instant successive postconviction petition. As the constraints on his liberty expired at the completion of his sentence in 2001, he cannot now seek to avoid the consequences of his felony conviction by invoking the Act. Rajagopal, 381 Ill. App. 3d at 332.

Defendant concedes that he completed his probation before filing his postconviction petition, but argues that it is unconstitutional to deny a defendant who has served his sentence and is being deported because of his conviction a remedy. However, we need not decide whether defendant is completely without remedy. Given the posture of this case, it is sufficient to find that he has no remedy under the Act.[1] As defendant completed his

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[1]This court is aware of the United States Supreme Court's recent decision in Padilla v. Kentucky, --- U.S. ----, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), addressing the deportation consequences of a guilty plea. However, because defendant lacks standing under the Act, the holding in Padilla does not affect the outcome of the instant appeal.

sentence before he filed the instant petition, the Act and its remedies are not available to him (Rajagopal, 381 Ill. App. 3d at 330), and the trial court properly dismissed the petition. Having determined that defendant does not have standing under the Act, we need not address the merits of his petition. See Rajagopal, 381 Ill. App. 3d at 333.

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

HALL, P.J., with PATTI, J., and LAMPKIN, J., concurring.

APPENDIX B

Supreme Court of Illinois
Clerk of the Court
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

110785

November 24, 2010

Mr. Frederick F. Cohn
Attorney at Law
35 East Wacker Drive, Suite 1580
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No. 110785 - People State of Illinois, respondent, v. Andy Smith, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 29, 2010.